

EXHIBIT 49

2 THE COURT: Good afternoon.

4 First, I want to tell you what I have relative to

8 I have the presentence report which is dated May 11,

14 I should mention, unlike most cases, especially where
15 there is a trial, I know a lot about the case. I really don't
16 know what I would normally know in this case because I haven't
17 been through the trial. I have read the presentence report and
18 everyone's briefs, so I know what those tell me, but it is not
19 like I sat in a trial and heard the witnesses and so forth.

20 Anyway, I have that and I have the first memorandum.

21 I have the government's presentencing memorandum which
22 doesn't seem to have a date on it, but I got it on December 8
23 of 2009. That's when Mr. Brodsky was the AUSA on the case.

24 I have Mr. Patel's presentencing memorandum of May 17,
25 2010.

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1 I have the government's reply sentencing memorandum
2 that is dated October 12, 2010 which contains a substantial
3 appendix.

4 And then, finally, I have Mr. Patel's presentencing
5 reply memorandum which replies to the government reply
6 memorandum of October 25.

7 Is anybody aware of anything else that has been
8 submitted that I should have read that I haven't mentioned?

9 MS. APPS: Your Honor, I may have misheard the date
10 for the PSR, but I have something dated May 23, 2006. It is
11 the one with the recommendation.

12 THE COURT: What I have is, I believe, the original
13 draft that was -- I think Ms. Apps sent me whatever I have.

14 MR. PATEL: What it is, there is a cover memorandum
15 dated May 11, but the presentence report is actually dated May
16 23rd.

17 MS. APPS: Mr. Patel is correct. He has clarified the
18 confusion.

19 THE COURT: That's right. I don't know how they
20 managed to send a cover letter on May 11 enclosing something
21 written on May 23. I have the same thing. So that resolves
22 it.

23 So is there anything else that I should have?

24 MR. PATEL: Your Honor, the only thing -- and I don't
25 think it is really phenomenally critical -- we had made a

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1 reference to the letters that were attached to the original
2 presentence submission by Mr. Rutkoske's prior counsel. They
3 are generally letters of support.

4 THE COURT: I don't think I have ever seen those.
5 Now, letters like that very often disappear after a sentence.
6 This sentence occurred sometime around 2004, 2005, something
7 like that.

8 MR. PATEL: I believe it was 2006.

9 Your Honor, there are two letters attached to my
10 presentencing memorandum, the one from May.

11 THE COURT: Those I have.

12 MR. PATEL: I think those are really relevant to the
13 issue before your Honor.

14 THE COURT: I have those, and I have read them.

15 I am not too sure where I would find them. I think we
16 could probably try to requisition the file. I don't know where
17 the file is. If you want me to read those letters, I could
18 postpone this.

19 MR. PATEL: Your Honor, I think that we can go
20 forward.

21 THE COURT: I assume that the letters are of the type
22 that I am very familiar with. They are from family members and
23 friends who know him personally. Since this is a first
24 offense, probably some of them say, I can't believe he did
25 something like this, and some of them testify to that he is a

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1 good family man, etc., etc. I would expect letters like
2 that --

3 MR. PATEL: That is exactly correct. The only thing
4 that was remarkable about them is that there were 65 of them.

5 THE COURT: That's a lot.

6 Whatever you want me to do, I will do.

7 MR. PATEL: Your Honor, I think that we should go
8 forward.

9 THE COURT: My next question is a question of Mr.
10 Patel, and that is, have you reviewed the presentence report
11 with Mr. Rutkoske?

12 MR. PATEL: I have, your Honor.

13 THE COURT: Finally, does either side have any
14 disputes regarding any facts reported in the presentence
15 report -- I am not talking about guidelines calculations or
16 anything like there, but facts?

17 MS. APPS: Not from the government, your Honor.

18 MR. PATEL: Not such that would require a hearing,
19 your Honor. Obviously, Mr. Rutkoske has maintained his
20 innocence.

21 THE COURT: I have read a lot of papers, but you may
22 want to summarize or add to what you've submitted in writing.

23 Mr. Patel, you go first.

24 MR. PATEL: Your Honor, I think what this case really
25 comes down to is, is there evidence before the Court that would

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1 warrant a finding that the government has established a factual
2 basis for the Court to find that there was a loss enhancement
3 under the guidelines.

4 Our position is that there is not, that under the
5 teachings of this case from the Second Circuit, the methodology
6 for determining the loss -- and when I say "the loss," it is
7 the loss caused by the fraud -- and in this case, there may
8 have been market losses or investment losses by individual
9 investors, but there has been no proof, certainly no proof by
10 the method required by the Second Circuit, to establish that
11 anyone at Lloyd Wade caused that loss.

12 In the case most favorable to the government, what the
13 government established and what the Court of Appeals affirmed
14 was transactional causation, that is, but for the statements of
15 the brokers, these investors may not have purchased -- may not
16 have purchased the stocks. But there is nothing to establish
17 that anything that anyone at Lloyd Wade did to cause this loss.

18 Our expert has submitted to your Honor a report, a tax
19 form memorandum which indicates that this was a start-up
20 company. It had earnings in 1996 of approximately \$200,000 and
21 in 1997, \$103,000. This was a start-up company. There were
22 hundreds of such start-up companies. It didn't make it.

23 The one fact that is absent from any of the
24 government's proof is, as the Court of Appeals said, why this
25 scheme unraveled. If the brokers at Lloyd Wade were

Mr. Rutkoske also received a four-level enhancement for leadership role. As we said in our papers, we believe that there is a confusion there between his corporate role and his role in the conspiracy. He was in Texas. The fraud was working out of a New Jersey office. He visited it five times. And the undisputed evidence is that the first time he went there, any fraudulent activity stopped. And there is equivocal evidence as to whether it was ongoing on the other occasions, but everyone remembers, the first time he came, they just shut it down. We acknowledge in our papers that this ship may have

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1 it was just the wrong time. The Internet was coming, and they
2 were just a little early and it didn't make it. The sad part
3 about that is investors lost money because NetBet didn't make
4 it because it was early.

5 As Mr. Patel has said, this whole experience has been,
6 nonetheless, very, very traumatic for myself and my wife and my
7 kids, as I am sure you can appreciate. We were raising a good
8 family. And it has been so hard on all of my family. My wife
9 is not here today because my kids were so petrified that I was
10 coming here today that she had to stay home to kind of hold
11 their hand and make sure they were going to be OK.

12 The things that happened to me -- trauma happens in
13 people's lives and it is kind of what you do with it. I've
14 always tried to remake myself and learn from the past and go
15 forward in a better way. And I even give an analogy to the
16 movie, if everyone remembers, back in the '50s, a Christmas
17 movie, It's a Wonderful Life with Jimmy Stewart --

18 THE COURT: I think it is even older than that.

19 THE DEFENDANT: I thought it was '54 or something like
20 that, anyway, we all know the movie. But he was taken away
21 from his life and he got a chance to see what life was without
22 him and was able to come back.

23 Well, I have had that same opportunity to see what
24 life was like without me around while I was incarcerated with
25 both my kids and my wife and even reflect back on the events of

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1 Lloyd Wade Securities, and it makes you certainly appreciate
2 your wife and kids more and it makes you appreciate things of
3 the past, investors and their aspirations. That is why I have
4 learned quite a bit from that, how to be more appreciative of
5 my family -- which I was before, but it is really a
6 It's-a-Wonderful-Life type of event. I certainly have a bigger
7 appreciation for trying to keep better controls on people that
8 are out there representing you, make sure that people don't
9 misrepresent you in the future, because that's important,
10 obviously.

11 As Mr. Patel said, in looking to go forward in my
12 life, I really tried to focus on something that I felt would be
13 giving back and accomplishing something for my community or the
14 state of Texas as well as this country. And the wind farm that
15 I have been working quite heavily on, it is at 740 megawatts,
16 which is enough to light about 350,000 homes. It represents
17 about 7 percent of the total wind power in the state of Texas,
18 and something of that magnitude, it makes a difference in terms
19 of helping our country and Texas lessen our dependence on
20 foreign oil. Our job report says that we will create 3,260
21 jobs. So I have tried to focus on something that gives back
22 and is good for me and good for the state of Texas and good for
23 the United States of America because I love my country.

24 I guess, in closing, your Honor, I leave it to you but
25 I ask you for your mercy, not to send me back to prison and

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1 government obviously submitted to the Court the record evidence
2 about the true value of NetBet stock. And I think that the
3 evidence did show that this stock was, effectively, worthless.
4 It was the subject of this pump and dump scheme. There was the
5 research person, Mr. Ardt, who testified that it was worthless.
6 The government certainly argued at trial that it was nothing
7 but a shell company. So the Court has that information set out
8 in the papers. That is one possible approach to measuring the
9 loss here.

10 The other approach is to look at the victims who
11 testified at trial. Mr. Patel, I just heard him say that this
12 but-for causation, the investors wouldn't have bought but for
13 the loss, doesn't cut it under the Court of Appeals decision.
14 But that simply is not case.

15 This is a different methodology than was previously
16 before the Court of Appeals in this case. The Rutkoske Court
17 of Appeals was considering an analysis which just took the
18 whole outstanding shares and multiplied it by a number, very
19 different analysis.

20 If you look at it just from the victims' point of
21 view, what you have is a case of some victims who wouldn't have
22 bought the stock but for the fraudulent boiler room tactics.
23 And the Court of Appeals decision in Leonard, which comes after
24 Rutkoske is on all fours with this case, and that decision
25 says, what you do is, you basically rescind the residuary

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1 measure of damages, essentially, and you go back to zero, but
2 you give some credit to the defendant for whatever value of an
3 asset that is bestowed. In other words, if you cannot
4 completely unwind, you give them credit.

5 And what the government did in its alternative loss
6 methodology that we put forth in our recent papers was to add
7 up the amount that these four victims who testified at trial
8 invested and subtracted from that whatever the value was of the
9 NetBet stock on the last NetBet statement that they got from
10 Lloyd Wade, not because we think that that value is true, but
11 that is just a way -- a very generous or a conservative way, I
12 should say -- of measuring whatever the value was, what they
13 got on the last statement, what the investors got back. The
14 numbers, obviously, are set forth in our brief, but that is
15 just an alternative way to measure the loss in this case.

16 Actually, I just want to mention one other thing that
17 was put forth in Mr. Patel's reply papers which we didn't
18 respond to, obviously, but a very similar argument put forth
19 where what Mr. Patel does, he sets up this sort of straw man
20 argument, if you like, because he says, these cases all have to
21 be considered in the accounting fraud rubric type case. You
22 have to have what he calls loss causation.

23 And the next step in Mr. Patel's analysis is, in order
24 to get any loss at all under that analysis, you have to have a
25 date certain when the fraud was revealed to the market. And

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1 then he said, well, you can't have a date certain in a case
2 like this because, of course, nothing like an accounting fraud
3 case, there isn't some public announcement revealing the fraud,
4 but that was an entirely, we submit, circular argument. It
5 sets out this notion that the only way to look at loss in a
6 case like this is to fit the case within the accounting fraud
7 rubric and then say you can't possibly ever find loss there
8 because it is not like an accounting fraud case and doesn't
9 have a date of a public announcement. So that, we submit, is
10 not an appropriate or the right way to look at loss in this
11 case.

12 As I said before, the Court could either go, depending
13 on the Court's view of the analysis of NetBet being worthless
14 with that loss amount, which is obviously very high, in the 10
15 to 12 million range, or it would be the four victims for which
16 we have concrete evidence in the trial record that they would
17 not have purchased their stock but for the fraudulent tactics
18 of the Lloyd Wade brokers.

19 May I just turn to the leadership role argument, your
20 Honor?

21 I think that argument is foreclosed. The case law
22 which we set forth in our papers is very clear that when the
23 Court of Appeals issues a mandate back to the District Court
24 for a very narrowed or limited purpose, that does not authorize
25 the District Court to go back to the issues that were not

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1 repackaging the very same method on a smaller scale. So
2 instead of saying we are going to look at all the investors, we
3 are just going to look at the four that testified. But the
4 methodology doesn't advance the requirement the Court of
5 Appeals found.

6 Leonard does not help the government because Leonard
7 did not involve the market, and that is what the government
8 would like -- the effect of the market is what the Court of
9 Appeals was saying had to be considered in terms of determining
10 the loss. No one is suggesting that the investors didn't lose
11 money. That is why the Court of Appeals affirmed his
12 conviction. But there is a method that the Court of Appeals
13 required. I merely followed the path laid out by the Court of
14 Appeals and looked for the evidence in the record and it wasn't
15 there.

16 THE COURT: By the way, I didn't mention it before,
17 but I have read the Court of Appeals decision remanding the
18 case to the District Court a number of times, and I am quite
19 familiar with it.

20 I repeat again, this was not my case, not my trial.
21 The original sentence was not mine. I have tried to stay
22 within the green band and as close as possible to what I
23 perceive to be Judge Casey's thinking on the issues that were
24 not remanded, that were not the subject of the appeal, and I
25 come out as follows.

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1 In the Court of Appeals decision in this case, the
2 court said, "We see no reason why considerations relative to
3 loss causation in a civil fraud case should not apply at least
4 as strongly to a sentencing regime in which the amount of loss
5 caused by a fraud is a critical determinant of the length of
6 the defendant's sentence."

7 In United States v. Olis which is a Fifth Circuit case
8 at 429 F.3d 540, the year is 2005, which is cited by the Court
9 of Appeals in this case with approval, the Fifth Circuit said,
10 "There is no loss attributable to a misrepresentation unless
11 and until the truth is subsequently revealed and the price of
12 the stock accordingly declines." That is at page 546.

13 The Second Circuit in this case notes that in Olis,
14 the Fifth Circuit was applying the teachings of the Supreme
15 Court in Dura, a pharmaceuticals case.

16 Now, the government has not identified or even
17 suggested a point in time in this case when the truth was
18 revealed -- indeed, if it ever was revealed. I don't think the
19 conclusion suggested by the case law can be avoided on the
20 ground that the stock was worthless. There was evidence that
21 it did have some computer infrastructure and actual games on
22 the Internet at some sort of an office although, apparently, it
23 was not a very impressive office. And it did have some income,
24 and it was, I think, owed a fairly substantial amount of money
25 by somebody else. A company isn't worthless if it is a very

In the Leonard case, I think the distinguishing factor there is that the securities were illiquid, and that was the difficulty that the Court of Appeals was dealing with. After it went through some -- I hate to use the word "contortions," but some sort of steps which convinced them that they were dealing with security -- no, that is Confredo, I think. In any event, in the Leonard case, the securities were illiquid securities, and that's why they had to deal with them the way they did. And I do not think that is the case here. Indeed here, as the whole record shows, there was a market, whether

Finally, we get to role enhancement.

I obviously have to, first, in any case determine the guidelines range. So I find here that the correct guideline, calculation is a total offense level, after I take out 15 for the amount of loss to be 16, with a criminal history category I which results in a guidelines range of 21 to 27 months.

Counsel for the defendant has shown that defendant has served, prior to release on bail, 18 months and 27 days and would be entitled to good time credit in an amount that leads to the conclusion that he has now served the equivalent to 21 months, which is the bottom of the guideline range. And I am sentencing Mr. Rutkoske's to 21 months of imprisonment which is, in effect, time served.

(212) 805-0300

2 MR. PATEL: Ms. Apps.

4 MR. PATEL: Yes, you have.

6 Restitution and intended loss for guideline purposes have to be
7 the same.

9 MS. APPS: No, I don't think they have to be the same.

16 MR. PATEL: Your Honor, the other issue that I wanted
17 to ask your Honor to consider, Mr. Rutkoske has been on,
18 essentially, supervision since his release on May 23, 2008
19 which means that he would have effectively already served two
20 years of supervised release. If your Honor were to nunc pro
21 tunc the date of his supervision to that date.

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1 THE COURT: Yes.

2 And then Ms. Apps can have a week to respond to it.

3 MS. APPS: Thank you.

4 MR. PATEL: Just one other request, your Honor. Now
5 that sentence has been imposed and Mr. Rutkoske is no longer on
6 bail, may his passport be returned to him and may he travel
7 abroad?

8 THE COURT: His passport will be returned to him, yes.
9 He may travel abroad with the permission of whatever officer is
10 supervising him. I do not have an objection to him doing it,
11 but I think that should go before the officer. The objection
12 that I had prior to sentencing isn't applicable anymore. I
13 know this came up before and I said that he can travel all
14 through the U.S but not overseas. I have no objection to that
15 anymore, but it is a decision to be made, in the first
16 instance, by whoever is in charge of his supervised release.
17 You may report my views on that to them.

18 MR. PATEL: Actually, what I was going to do, your
19 Honor, is ask to get an expedited copy of the sentencing --

20 THE COURT: I will authorize that if you just fill out
21 the form.

22 MR. PATEL: Thank you very much.

23 THE COURT: Thank you all.

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